

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1220

B
P/S

To be argued by
MICHAEL HARTMERE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1220

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEO HENDRICKS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

PETER C. DORSEY,
United States Attorney
District of Connecticut
915 Lafayette Boulevard
Bridgeport, Connecticut 06601

MICHAEL HARTMERE
Assistant United States Attorney
District of Connecticut

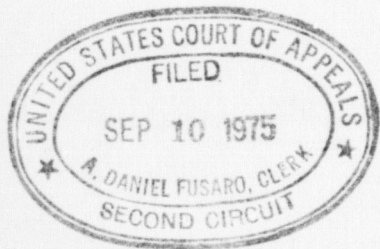




TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statutes Involved	2
Statement of Facts	5
ARGUMENT:	
I. Appellant's Motions For a Mistrial removed any barrier to reprosecution; therefore the trial Court's denial of Appellant's Motion To Dismiss Indictment was proper	10
II. The District Court properly denied Appellant's Motion to Preclude Testimony	14
III. The District Court correctly instructed the Jury on the law applicable to this case ...	16
CONCLUSION	18

Citations

<i>Gori v. United States</i> , 367 U.S. 364 (1961)	11
<i>Mischlich v. United States</i> , 404 U.S. 984 (1971)	12
<i>Raslich v. Bannan</i> , 273 F.2d 420 (6th Cir. 1959) ...	12
<i>Roberts v. United States</i> , 477 F.2d 544 (8th Cir. 1973)	12
<i>United States v. Ayers</i> , 426 F.2d 524 (2d Cir.), cert. denied, 400 U.S. 842 (1970)	15
<i>United States v. Beasley</i> , 479 F.2d 1124 (5th Cir.), cert. denied, 414 U.S. 924; rehearing denied, 414 U.S. 1052 (1973)	13

	PAGE
<i>United States v. Craven</i> , 478 F.2d 1329 (6th Cir.), cert. denied, 414 U.S. 866, rehearing denied, 414 U.S. 1086 (1973)	16
<i>United States v. Cruz</i> , 492 F.2d 217 (2d Cir.), cert. denied, 417 U.S. 925 (1974)	16
<i>United States v. Franke</i> , 409 F.2d 958 (7th Cir. 1969)	12
<i>United States v. Goldstein</i> , 479 F.2d 1061 (2d Cir. 1973)	12
<i>United States v. Gori</i> , 282 F.2d 43 (2d Cir. 1960), aff'd, 367 U.S. 364 (1961)	14
<i>United States v. Heckman</i> , 479 F.2d 726 (3d Cir. 1973)	15
<i>United States v. Heiden</i> , 508 F.2d 898 (9th Cir. 1974)	15
<i>United States v. Hensley</i> , 374 F.2d 341 (6th Cir. 1967)	15
<i>United States v. Jamison</i> , 505 F.2d 407 (D.C. Cir. 1974)	12
<i>United States v. John</i> , 508 F.2d 1134 (8th Cir. 1975)	15
<i>United States v. Jorn</i> , 400 U.S. 470 (1971)	13
<i>United States v. Mallah</i> , 503 F.2d 971 (2d Cir. 1974)	13
<i>United States v. Pappas</i> , 445 F.2d 1194 (3d Cir.), cert. denied sub nom.	12
<i>United States v. Peden</i> , 472 F.2d 583 (2d Cir. 1973)	15
<i>United States v. Perez</i> , 22 U.S. (9 Wheat.) 579 (1824)	12
<i>United States v. Romano</i> , 482 F.2d 1183 (5th Cir. 1973)	12
<i>United States v. Tateo</i> , 377 U.S. 463, 467 (1964) ...	14
<i>Wade v. Hunter</i> , 336 U.S. 684 (1949)	11

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1220

UNITED STATES OF AMERICA,

Appellee,

—V.—

LEO HENDRICKS,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On December 21, 1973, a Federal Grand Jury sitting at Hartford, Connecticut, returned a True Bill of Indictment (H-618) charging the defendant, Leo Hendricks, and a co-defendant, Evelyn Cora Parracino, with violation of Title 26, United States Code, Sections 5861(d) and 5871, in One Count. The indictment charged that the defendants had wilfully and knowingly received and possessed firearms, that is, two destructive devices (explosive or incendiary firebombs), which had not been registered to either of them in the National Firearms Registration and Transfer Record, on September 10, 1973.

On February 11, 1974, the defendant Parracino entered a plea of Not Guilty. On February 19, 1974, the defendant Hendricks entered a plea of Not Guilty.

Trial by jury commenced on January 14, 1975, in the United States District Court, Hartford, before the Honorable M. Joseph Blumenfeld, United States District Judge. On January 15, 1975, the Court granted a mistrial as to the defendant Hendricks on the Motion of the Defendant Hendricks. Jury trial continued as to the defendant Parracino. The jury returned a verdict of Not Guilty as to the defendant Parracino on January 17, 1975. The Government filed a Notice of Readiness to proceed with a retrial against the defendant Hendricks on January 22, 1975.

The defendant Hendricks filed a Motion To Dismiss Indictment on March 5, 1975, and a Motion To Preclude Testimony on March 7, 1975. After a full evidentiary hearing and arguments by both counsel, the Court denied both Motions on March 17, 1975.

Jury trial as to the defendant Hendricks commenced on March 18, 1975. The trial concluded on March 20, 1975, and after approximately three and one-half hours of deliberation, the jury returned a verdict of Guilty.

Defendant was sentenced to the custody of the Attorney General for five years on June 2, 1975. Subsequently, a timely Notice of Appeal was filed.

Statutes Involved

Title 26, United States Code,

§ 5345. Definitions

For the purpose of this chapter—

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than

26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

* * * * *

(f) Destructive device.—The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device,

although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordinance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

* * * * *

Title 26, United States Code,

§ 5861. Prohibited acts

It shall be unlawful for any person—

* * * * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * * * *

§ 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both, and shall be done eligible for parole as the Board of Parole shall determine.

Added Pub.L. 90-618, Title II, & 201, Oct. 22, 1968. 82 Stat. 1234.

Statement of Facts

At approximately 1:30 a.m. on September 10, 1973, there was an explosion with a fire resulting in an apartment building at 194 Washington Street, Hartford, Connecticut (Tr. II, p. 9).^{*} Deffin Davis, the occupant of an apartment in the building, had been watching television in his apartment at the time of the explosion and fire, and received third degree burns on his ear, head, and back (Tr. II, p. 10). Davis testified that "gas or something starting shooting all over the room", that he left the room, and that he then heard another explosion (Tr. II, p. 26). Lieutenant Henry Tracy, an inspector and fire investigator with the Fire Marshal's Office, Hartford Fire Department, after conducting an investigation, determined the cause of the fire to be arson caused by a firebomb (Tr. II, p. 181). Lieutenant Tracy's opinion was based in part on pieces of glass found at the scene of the fire by Hartford Police Sergeant Bernard Sullivan (Tr. II, pp. 138 and 139). The pieces of glass collected as evidence were fragments of coke bottles with a black residue denoting use in a firebomb (Tr. II, pp. 141, 178 to 180). Sergeant Sullivan testified that on September 7, 1973, the appellant, Leo Hendricks, had stated "Red Davis squealed on me. I am going to get that mother fucker" (Tr. II, pp. 136 and 137).

An associate of the appellant's, one Andrew Johnson, was with the appellant, Miss Parracino, and others on September 8, 1973, when a plan to throw "Molotov Cock-

^{*} References marked "(Tr. II)" refer to the transcript of proceedings held in the trial Court from March 18, 1975, to March 20, 1975.

tails" through the window of the Davis apartment was discussed (Tr. II, pp. 60 through 62). Johnson was also with the appellant during the night of September 9, 1973, in a vehicle in which he saw a can containing liquid. Johnson could smell gasoline. At this time the appellant asked Johnson to help firebomb the Davis apartment (Tr. II, p. 63). The appellant and Johnson went to several locations, including the apartment of one Steven P. Duffen, to find someone to help firebomb the Davis apartment (Tr. II, pp. 66 through 67). Johnson testified that the appellant eventually exited the automobile carrying the can, two coke bottles, and rags, in the area of the Davis apartment (Tr. II, pp. 68 and 69). Approximately ten minutes later Johnson heard a scream and shortly thereafter the appellant returned stating "I guess that will fix his ass" (Tr. II, p. 71). Thereafter the two discussed an alibi for their night and early morning activities (Tr. II, pp. 71 and 72). Cynthia Johnson, the wife of Andrew Johnson, had been with her husband, the appellant, and others on September 8, 1973, when the appellant discussed the firebombing of Davis with the others (Tr. II, p. 52).

Evelyn Parracino, appellant's co-defendant who had been acquitted after the first jury trial of this case, testified that while leaving the Hartford Police Station on September 7, 1973, the appellant had told her that he was going to firebomb Davis (Tr. II, p. 227). Parracino also testified concerning the conversation with the Johnsons and the appellant concerning the firebombing of Davis (Tr. II, pp. 227 through 231). Parracino testified that during the evening of September 9, 1973, Andrew Johnson was at her apartment and asked for rags, and was told where Handiwipes could be located. A few minutes later, Johnson appeared in the doorway of Parracino's bedroom

carrying two bottles with Handiwipes coming out of the top and wrapped around the middle. The appellant was standing directly behind Johnson, and appellant told Parracino that the rags around the middles of the bottles were to avoid leaving fingerprints (Tr. II, pp. 232 through 234). Parracino testified that appellant called her early in the morning of September 10, 1973, and stated "he got his". Appellant then proceeded to describe the screams of Davis' wife (Tr. II, p. 235). Appellant later returned to Parracino's apartment "grinning and excited" (Tr. II, p. 238). Later that day, appellant told Parracino "how sweet it was" because the livingroom light was still on (Tr. II, p. 237).

Steven Duffen testified that the appellant had come to Duffen's apartment on September 10, 1973, at approximately 1:00 a.m. and had asked Duffen to accompany him to Washington Street to throw a Molotov Cocktail through the window of Deffin Davis (Tr. II, pp. 194 to 196). Duffen testified that he went outside of the apartment to the car in which Hendricks was riding where he saw Andrew Johnson. At the car Duffen observed two bottles with liquid inside and one rag on the top of each bottle, and Duffen smelled gasoline (Tr. II, pp. 197, 198). Duffen observed one Molotov Cocktail on the floor of the car and one in the hand of Andrew Johnson (Tr. II, p. 198). Duffen did not leave his apartment area with the appellant and Johnson (Tr. II, pp. 197, 198). Duffen next saw the appellant one or two days after the incident inside the burned out apartment of Deffin Davis. Both were standing by the window overlooking the driveway when appellant stated "See how little room I had to throw it" (Tr. II, p. 203). It was this statement by the appellant, as transcribed in the minutes of Duffen's testimony before

the Grand Jury, which caused a mistrial to be declared as to the appellant during the first jury trial of this case.¹

During the direct examination Duffen in the first jury trial, the Government did not elicit any testimony from Duffen concerning the appellant's admission to Duffen one or two days after the incident (Tr. I, pp. 136-146).*

However, during the cross-examination of Duffen by appellant's counsel, appellant's counsel did attempt to question the witness concerning this conversation (Tr. I, pp. 152 and 153). Objections to this line of inquiry were sustained. Thereafter, neither counsel for co-defendant Parracino, nor the Court inquired into the questionable

¹ The Grand Jury testimony of Steven P. Duffen on December 20, 1973, is contained in its entirety in Appellant's Appendix, pp. 10 through 17. The statement in question appears at the bottom of p. 17 of Appellant's Appendix, and was p. 7 of Duffen's Grand Jury transcript. The page reads as follows:

A. Yeah. And I spoke to Leo in Jail the night that Grasso got me out, but I had spoken to him and he said do you think Deflin had told me that I was the one that threw it through the window? And I said, gee, I don't know. I have no idea.

Q. You saw two bottles? A. Two bottles. Yeah.

Q. Do you know how many were thrown? A. No. No idea. It was a good shot. I have to give him credit for that.

Q. Did he ever say he threw it? That's what I'm driving at. A. Yeah. We went over there because Red was right up the street. She moved right up the street.

Q. She moved out of 53 Hamilton? A. Yeah. She lives on the bottom floor of Washington Street. She let us in and I went in and looked around and she showed me how much damage was done and she said, "Now see how much space I had to work with?" I looked around. What a mess. It went right up the wall.

Mr. Buckley: You are excused. (Witness excused.)

* Reference is marked "Tr. I" refer to the proceedings in the trial Court held January 14, 1975 through January 17, 1975.

conversation (Tr. I, pp. 156-162, 162-166). On redirect examination by the Government, the witness testified that he did not remember what was said by appellant during this conversation (Tr. I, pp. 166-170). During re-cross-examination by appellant's counsel, the witness again testified that he did not know to what the conversation recorded on page 7 of his Grand Jury transcript referred (Tr. I, p. 173).

At this point the Government requested a bench conference where the Government represented that "possibly" this investigative Grand Jury was hearing evidence of another crime and that page 7 of Duffen's Grand Jury transcript had been included by mistake (Tr. I, pp. 174-176). As pointed out by appellant's counsel, the Government attorney at trial had not presented the case to the Grand Jury, and was not present during its presentation (Tr. I, p. 201). The Government attorney at trial did interview the Special Attorney who had presented the case to the Grand Jury, and it was the opinion of the former Special Attorney that page 7 did not deal with the case involving Parracino and the appellant (Tr. I, pp. 201 and 202).

After an evidentiary hearing out of the presence of the jury at which time the Court Reporter who had transcribed the Grand Jury minutes was examined to explain the testimony, appellant's counsel moved for a mistrial (Tr. I, pp. 204, 205). The witness, Steven Duffen, thereafter resumed the witness stand at the request of counsel for co-defendant (Tr. I, pp. 217, 218). During re-cross-examination by co-defendant's counsel, the witness remembered the conversation with appellant for the first time (Tr. I, pp. 221, 222). Appellant's counsel during further re-cross-examination of the witness elicited testi-

mony concerning the statements by appellant (Tr. I, pp. 222 through 229). After further re-cross-examination by counsel for co-defendant (Tr. I, pp. 229 through 231), the Government had the witness explain his Grand Jury testimony (Tr. I, pp. 233 through 238). At this point, appellant's counsel again moved for a mistrial (Tr. I, pp. 242, 243). The Court reserved decision on appellant's Motion after brief arguments out of the jury's presence by counsel (Tr. I, pp. 242-247). Thereafter, appellant's counsel moved for a mistrial for the third time which was granted by the Court as to the appellant (Tr. I, pp. 328-331).

Prior to the commencement of the retrial of appellant, appellant moved to dismiss the indictment and to preclude the testimony of Steven Duffen, which Motions were both denied by the Court after a full evidentiary hearing. The denial of these Motions by the Court is claimed as error in this appeal, as is the Court's jury instructions.

A R G U M E N T

I.

Appellant's motions for a mistrial removed any barrier to reprosecution; therefore the trial court's denial of appellant's motion to dismiss indictment was proper.

The United States Supreme Court has stated:

"The Double Jeopardy Provision of the Fifth Amendment, however, does not mean that every-time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final Judgment. Such a rule would create an insuperable obstacle to the administration

of justice in many cases in which there is no semblance of the type of oppressive practices at which the Double Jeopardy prohibition is aimed." *Wade v. Hunter*, 336 U.S. 684, 688 (1949).

It is clear that a retrial of a defendant is not barred where a mistrial has been declared by the trial Court "in the sole interest of the defendant". *Gori v. United States*, 367 U.S. 364 (1961). In a case where the presiding Judge, on his own Motion and with neither approval nor objection by the defendant, declared a mistrial, the United States Supreme Court, in upholding the Government's right and duty to retry the defendant stated:

"Where, for reasons deemed compelling by the trial Judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. . . . suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial." *Gori v. United States*, *supra*, at 368, 369.

In the present case, the mistrial was declared by the trial Court on the Motion of the defendant and in the sole interest of the defendant. The Government at all times opposed the appellant's Motion for a mistrial. The Government had chosen to charge both defendants as co-venturers in a crime. The Government obviously wanted to proceed against the defendants as it had charged them and had to the point of the mistrial presented its evidence accordingly. The prejudice to the Government arising from the granting of the mistrial as to the appellant was

overwhelming as reflected in the jury verdict as to the co-defendant. At trial, the defendant argued, against Government objections, for the declaration of a mistrial, and now argues that the mistrial benefited the Government. A reading of the trial transcript belies this contention. It is obvious that the trial Court declared a mistrial solely in the interest of the appellant (Tr. I, pp. 328-331).

Appellant contends that his retrial, after his Motion for Mistrial was granted by the trial Court, subjected him to double jeopardy in violation of the Fifth Amendment to the United States Constitution. During the appellant's first trial, appellant pursued his Motion for a Mistrial on three occasions, while the Government at all times opposed appellant's Motion (Tr. I, pp. 204, 205, 242, 243, 328). While technical jeopardy had attached in the first trial once the jury was impanelled, it has long been held that the matter of jeopardy does not then end. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). Where a defendant moves for a mistrial or consents to the declaration of a mistrial, he may not thereafter resort to a claim of double jeopardy. *United States v. Goldstein*, 479 F.2d 1061 (2d Cir. 1973). This general rule that a mistrial on a defendant's Motion does not bar retrial is also firmly established in other Circuits. See, for example, *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974); *United States v. Romano*, 482 F.2d 1183 (5th Cir. 1973); *Roberts v. United States*, 477 F.2d 544 (8th Cir. 1973) (*Per Curiam*); *United States v. Pappas*, 445 F.2d 1194 (3d Cir.), *cert. denied sub nom., Mischlich v. United States*, 404 U.S. 984 (1971); *United States v. Franke*, 409 F.2d 958 (7th Cir. 1969); *Raslich v. Bannan*, 273 F.2d 420 (6th Cir. 1959).

In the present case, appellant claims to have been misled in his cross-examination of the witness Duffen by the Government's providing appellant with an inaccurate transcript of the witness' Grand Jury testimony. The Government provided the appellant with the only transcript of the witness' Grand Jury testimony which the Government had in its possession. The Government had noted the inaccuracy of page 7 of the transcript and for that reason elected not to elicit testimony concerning the conversation denoted thereon (Tr. I, pp. 136-146). Appellant's counsel, however, made attempts to inquire as to the conversation despite objections (Tr. I, pp. 152, 153, 173). It was only after the witness remembered that the conversation, in fact, had occurred with the appellant, that the alleged prejudice to appellant resulted.

Appellant concedes that the present case reflects "neither a breakdown of judicial machinery, harrassment nor intentional misconduct on the part of the prosecution" (Appellant's Brief p. 7). Appellant chose to persistently pursue his Motion for a Mistrial and should not now be allowed to claim he was prejudiced by the trial Court's granting of his Motion. Absent a showing of gross negligence or intentional misconduct, neither of which is present in this case, the Government is not barred from reprosecuting a defendant. *United States v. Beasley*, 479 F.2d 1124 (5th Cir.), *cert. denied*, 414 U.S. 924; *rehearing denied*, 414 U.S. 1052 (1973). In a case where the declaration of a mistrial without the defendant's consent was found to be an abuse of judicial discretion, the Supreme Court stated: "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a Motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's Motion is necessitated by prosecutorial or judicial error." *United States v. Jorn*, 400 U.S. 470 at 485 (1971). See also, *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974).

Under the facts of the present case, where the appellant repeatedly moved for a mistrial, the law is clear that the appellant may not thereafter rely upon a plea of double jeopardy. *United States v. Gori*, 282 F.2d 43, 47 (2d Cir. 1960), *aff'd*, 367 U.S. 364 (1961); *United States v. Tateo*, 377 U.S. 463, 467 (1964). Therefore, appellant's Motion to Dismiss Indictment based upon a claim of double jeopardy was properly denied by the trial Court.

II.

The District Court properly denied appellant's motion to preclude testimony.

Appellant contends that the trial Court erred in denying appellant's Motion to Preclude Testimony since the transcript of the Grand Jury testimony of Steven Duffen that was provided to defense counsel by the Government was neither complete nor accurate. The Government admits that it did not provide defense counsel with a complete and accurate transcript of the witness' Grand Jury testimony. The Government did provide defense counsel with the only available transcript of this testimony which the Government had in its possession. As efforts to determine the actual testimony of the witness met with negative results until trial, the Government could not provide an accurate transcript. There was no way for the Government attorney at trial to determine what had transpired in the Grand Jury proceedings except thorough interviews through those who were present, namely, the Government attorney and the witness. Those interviews met with negative results (Tr. I, pp. 201-202, 208-209, 330-331). It was obviously in the Government's interests to determine the exact testimony of the witness before the Grand Jury. However, under the circumstances it was not possible.

The reporter who transcribed the Grand Jury testimony in question testified that she had transcribed all of the witness' testimony except for a portion which the former Special Attorney, Drug Enforcement Administration Task Force, told her would be "off the record" (Tr. I, pp. 187-188). According to the reporter, she had been instructed by the former Special Attorney not to record off the record discussions. There is no constitutional or statutory requirement that Grand Jury testimony be recorded, or that even if stenographic notes were taken, that they be transcribed. *United States v. Ayers*, 426 F.2d 524 (2d Cir.), cert. denied, 400 U.S. 842 (1970). There is also no requirement for a recordation of prosecutorial statements to the Grand Jury, although in both cases, it is considered better procedure. *United States v. Peden*, 472 F.2d 583 (2d Cir. 1973). Recent cases in other Circuits are in accord. See, *United States v. Heiden*, 508 F.2d 898 (9th Cir., 1974); *United States v. John*, 508 F.2d 1134 (8th Cir., 1975); *United States v. Heckman*, 479 F.2d 726 (3d Cir., 1973); *United States v. Hensley*, 374 F.2d 341 (6th Cir., 1967). Appellant should not be allowed to allege prejudice from an "off the record" discussion without some showing of prejudice. The Government contends that there has been no prosecutorial conduct or misconduct in this case resulting in prejudice to the defendant at any stage in the proceedings. The trial Court specifically found that the probable cause necessary for the Grand Jury to return an indictment in the present case was provided regardless of the testimony of the witness Steven Duffen (Appellant's Appendix pp. 7-8).

If the Government is under no duty to transcribe Grand Jury minutes, and a mistake or mistakes are made by a stenographer during a transcription, the Government should not be penalized therefor. Appellant was put on notice during the first trial as to what the witness, Steven Duffen, claimed his Grand Jury testimony had

been. There was no reason, then, for the trial Court to preclude introduction of Duffen's testimony, and the trial Court properly denied appellant's Motion.

III.

The District Court correctly instructed the jury on the law applicable to this case.

The trial Court's charge to the jury on the law to be applied in this case, when viewed *in toto*, was totally proper.² *United States v. Cruz*, 492 F.2d 217 (2d Cir.), *cert. denied*, 417 U.S. 935 (1974); *United States v. Craven*, 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866, *rehearing denied*, 414 U.S. 1086 (1973). The trial Court at all times correctly instructed the jury as to the concept of "possession" (Tr. II, pp. 381-383, 388-389, 392, 406-410).

After jury deliberations had begun, the jury requested answers to two questions by the Court: "Could you explain the difference between active and constructive possession?" and "When is a bomb a bomb?" Appellant asserts that the Court initially correctly stated the law on constructive possession to the jury (Appellant's Brief, p. 15), but appellant claims that the Court incorrectly instructed the jury that appellant could be found in possession of a firebomb by merely being present at the location of a firebomb. Appellant's claim is not supported by the record. The trial Court emphasized that appellant had to have dominion or control over the object to be in constructive possession of the object (Tr. II, pp. 406-410).

² The trial Court's jury instructions are found in their entirety in Appellant's Appendix beginning at page 18, and in the trial transcript (II) pp. 379-412.

The trial Court's final instructions to the jury before returning the jury to its deliberations were as follows:

"So if you find from the evidence beyond a reasonable doubt, that is, that you are satisfied beyond a reasonable doubt that the accused, Leo Hendricks, either alone or jointly with others, Johnson or whoever, had actual or constructive possession as I have defined it to you, that is the power of control of the bomb, then you may find that the bomb was in his possession within the meaning of the word "possession" as used in the statute, which imposes a criminal liability for one in possession of an unregistered bomb.

I don't want to make it appear too technical. It isn't. It is a matter of practicality.

Is there control? Under those circumstances, did he have the power to control the possession of that bomb, if it was a bomb?" (Tr. II, p. 410).

It is clear that the trial Court at all times correctly stated the law of constructive possession, and neither intentionally nor unintentionally misled the jury. *United States v. Craven, supra*.

The trial Court's instructions to the jury, when viewed in their entirety, were entirely proper.

CONCLUSION

For all of the foregoing reasons, the Government submits that there was no error in the rulings of the District Court as to defendant's Motions nor in the trial Court's instructions to the jury. It is respectfully urged that the Judgment of conviction be affirmed.

Respectfully submitted,

PETER C. DORSEY,
United States Attorney
District of Connecticut
915 Lafayette Boulevard
Bridgeport, Connecticut 06601

MICHAEL HARTMERE
Assistant United States Attorney
District of Connecticut

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 75-1220

UNITED STATES OF AMERICA

Appellee

v.

LEO HENDRICKS

Appellant

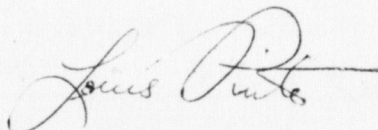
AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street
Brooklyn, N.Y.

That on the 10th day of September, 1975, deponent served the within Brief for the Appellee
upon Thomas Dennis, Esq.
6565 Ellington Road
South Windsor, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,



This 10th day of September 1975

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977

